Double Dynasty Sdn Bhd v Sime Darby Industrial Sdn Bhd (formerly known as Tractors (M) (1982) Sdn Bhd)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02–806 OF 2010

ABDUL WAHAB PATAIL, BALIA YUSOF AND TENGKU MAIMUN JJCA

21 AUGUST 2014

Contract — Breach — Indemnity — Contract providing for indemnity in the event of breach in respect of any claim against the respondent — Respondent claiming for indemnity without evidence of any claim against the respondent — Whether claim for indemnity allowed

The plaintiff/respondent had sold to the defendant/appellant four units of Caterpillar 320C Hydraulic Excavators ('the excavators'). Clause 12 of the sale agreement stated that the special discount called the initial subscription use ('the ISU discount') given by the principal, Caterpillar, was subject to the condition that each of the excavators bought must be used exclusively within the territories of Malaysia and Brunei and the excavator has attained its initial substantial use before being permitted to be exported out or used outside the said territories ('the ISU condition'). As provided by cl 12(d), if the ISU condition was breached, the appellant shall indemnify the respondent against any loss suffered by the respondent in respect of any claim brought by the principal against the respondent. In breach of the ISU condition, the appellant had disposed and allowed the excavators to be located outside the ISU territory prior to completion of its substantial use. This resulted in the excavators being put up for auction in Dubai. In order to mitigate their losses the respondent purchased the said excavators in the auction in Dubai and later had to sell them at a loss. The respondent claimed for the appellant to indemnify the respondent against the said loss. At the end of the respondent's case, the appellant elected not to call evidence and submitted that there was no case to answer. The trial judge entered judgment against the appellant. The appellant appealed on the grounds that the respondent's claim was for indemnity and that there was no evidence adduced by the respondent that the manufacturer or the principal had sought indemnity against the respondent.

Held, allowing the appeal with costs of RM10,000:

(1) The respondent had not pleaded that the ISU discount had been revoked and that a demand had been made on the appellant for the payment of the amount equivalent to the ISU discount. Neither was it pleaded that the principal had made any claim against the respondent. There being no

demand made by the respondent against the appellant under cl 12(d) of the conditions of sale, there was nothing for the appellant to indemnify under the terms of the agreement between the respondent and the appellant. And in the absence of the demand, the respondent's action in going to Dubai and in taking the steps which had given rise to the cost and expenses was entirely a voluntary action of their own (see paras 18–19).

(2) The respondent's action was pre-emptive to forestall the breach of the dealership agreement between the respondent and the principal and it had nothing to do with indemnification. There was no evidence adduced that the principal had sought any indemnity from the respondent, to trigger any claim by the respondent against the appellant under cl 12(d)(iii) of the conditions of sale (see para 20).

(3) The respondent was the author of their own loss. In the circumstances, the appellant ought not to be made liable to reimburse the expenses incurred by the respondent. The trial judge had erred in coming to the conclusion that the respondent had established the case against the appellant on the balance of probabilities (see para 21).

[Bahasa Malaysia summary

Plaintif/responden terpaksa menjual kepada defendan/perayu empat unit Caterpillar 320C Hydraulic Excavators ('the excavators'). Kluasa 12 perjanjian jualan menyatakan bahawa diskaun khas yang dikenali sebagai 'initial subscription use' ('diskaun ISU') yang diberikan oleh prinsipal, Caterpillar, adalah tertakluk kepada syarat bahawa setiap mesin pengorek yang dibeli mesti digunakan secara ekslusif dalam kawasan Malaysia dan Brunei dan mesin pengorek telah mencapai penggunaan substansial permulaannya sebelum dibenarkan untuk dieksport keluar atau digunakan di luar kawasan tersebut ('syarat ISU'). Seperti yang diperuntukkan oleh klausa 12(d), jika syarat ISU dimungkiri, perayu akan membayar kepada responden terhadap apa-apa kerugian yang dialami oleh responden berkaitan apa-apa tuntutan yang dibawa oleh prinsipal terhadap responden. Dalam kemungiran syarat ISU, perayu telah menjual dan membenarkan mesin penggorek diletakkan di luar kawasan ISU sebelum selesai penggunaan substansialnya. Ini mengakibatkan mesin pengorek diletakkan untuk dilelong di Dubai. Untuk mengurangkan kerugian mereka responden membeli mesin pengorek dalam lelongan di Dubai dan kemudiannya terpaksa menjualnya pada kerugian. Responden menuntut untuk perayu membayar kepada responden terhadap kerugian tersebut. Pada akhir kes responden, perayu memilih untuk tidak memanggil keterangan dan berhujah bahawa tiada kes untuk dijawab. Hakim bicara memasukkan penghakiman terhadap perayu. Perayu merayu atas alasan bahawa tuntutan responden adalah untuk indemniti dan bahawa tidak terdapat keterangan yang dikemukakan oleh responden bahawa pengilang atau prinsipal telah memohon indemniti terhadap responden.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM10,000:

(1) Responden tidak memplid bahawa diskaun ISU telah dibatalkan dan bahawa tuntutan telah dibuat ke atas perayu untuk bayaran jumlah bersamaan kepada diskaun ISU. Ia juga tidak diplidkan bahawa prinsipal telah membuat apa-apa tuntutan terhadap responden. Memandangkan tidak terdapat tuntutan yang dibuat oleh responden terhadap perayu di bawah klausa 12(d) syarat jualan, tidak terdapat apa-apa untuk perayu membayar di bawah terma perjanjian antara responden dan perayu. Dan dalam ketiadaan tuntutan, tindakan responden dengan pergi ke Dubai dan dalam mengambil langkah yang mana membangkitkan kepada kos dan perbelanjaan secara keseluruhannya tindakan sukarela mereka sendiri (lihat perenggan 18–19).

(2) Tindakan responden adalah terlebih dahulu untuk menghalang kemungkiran perjanjian wakil jualan antara responden dan prinsipal dan ia tidak ada kena mengena dengan indemnifikasi. Tidak terdapat keterangan yang dikemukakan bahawa prinsipal telah memohon apa-apa indemniti daripada responden, untuk mencetuskan apa-apa tuntutan oleh responden terhadap perayu di bawah klausa 12(d)(iii) syarat jualan (lihat perenggan 20).

(3) Responden adalah penyebab kerugian mereka sendiri. Dalam keadaan ini, perayu tidak patut bertanggungjawab untuk membayar balik perbelanjaan yang ditanggung oleh responden. Hakim bicara telah salah dalam mencapai kepada kesimpulan bahawa responden telah membuktikan kes terhadap perayu atas imbangan kebarangkalian (lihat perenggan 21).]

Appeal from: Suit No 22–21 of 2008 (MR) (High Court, Miri)

Shankar Ram Asnani (Liaw Siaw Woon with him) (Susanna & Lau) for the appellant.
Jimmy Wee (Jimmy HT Wee & Co) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] The plaintiff ('the respondent'), formerly known as Tractors Malaysia (1982) Sdn Bhd filed an action in the High Court against the defendant ('the appellant') in respect of the sale of four units of Caterpillar 320C Hydraulic Excavators ('the excavators').

[2] The relevant paragraphs of the amended statement of claim are reproduced below for ease of reference:

3. By an agreement in writing contained in and evidenced by the quotation letter dated the 14th day of February 2006 made between the Plaintiff and

the Defendant (hereinafter referred to as agreement), the Plaintiff sold and the Defendant purchased 4 units of new Caterpillar 320C hydraulic excavator from the Plaintiff at a nett selling price of RM$320,000.00 each upon the terms and conditions of the agreement.

5. The agreement to which the Plaintiff will refer as may be necessary for its full terms, meaning and effect, provided, inter alia as follows:

(5.1) Each selling price quoted above has already incorporated a special discount on the Caterpillar International price list (ISU Discount) which is given upfront, but subject to the condition that each of the equipment is used exclusively within the territories of Malaysia or Brunei and has attained its substantial use before being permitted to be exported out of or used outside the said territories. ...

7. In breach of the terms of the agreement the Defendant

(a) fails to allow or procure access to the excavators for Plaintiff to determine the number of service units clocked on the excavators,

(b) has disposed, allowed or caused the excavators to be located outside the ISU territory prior to completion of its substantial use resulted in the excavators being put up for auction in Dubai.

8. As a result of the aforesaid breach the Plaintiff sent their representative to Dubai to verify the excavators and requested or demanded the Defendant to remedy the said breach by bringing the excavators back to Malaysia but the Defendant has failed refused and or unable to do so.

9. In order to mitigate their losses the Plaintiff purchased the said excavators in the auction in Dubai on or about the 11.12.2006 for US$125,000.00 per unit excluding other expenses.

10. On or about the 21.12.2006 the Plaintiff vide letter from their Solicitors offered the Defendant the right of refusal to buy back the excavators at the same price of the US$125,000.00 per unit subject to terms and conditions stated in the said letter but the Defendant has failed refused and or are unable to do so.

11. Thereafter the excavators were sold for US$85,000.00 per unit on or about the 22.11.2007

12. By reason of the foregoing the Plaintiff has suffered loss and damage.

[3] After setting out the particulars of the loss and damage which comprise the expenses incurred in Dubai in respect of the auction and in respect of the storage and transportation of the excavators, the plaintiff pleaded:

13. On or about the 27.2.2008 the Plaintiff through their solicitors demanded that the Defendant indemnify the Plaintiff the said loss and damage but the Defendant has failed refused or are unable to do so.

14. And the Plaintiff claims against the Defendant:—

(a) RM829,280.82;

(b) Interest thereon at 8% from the date of Issuance of Writ until full and final settlement;

(c) costs on a full indemnity basis; and

(d) Such other relief of this Honourable Court shall deem fit.

[4] The plaintiff called witnesses to prove its claim in the High Court. At the end of the plaintiff's case, the defendant elected not to call evidence and submitted that there was no case to answer.

[5] The learned trial judge found that the plaintiff had established its case on a balance of probabilities. Since the defendant had elected not to give evidence, the learned trial judge entered judgment against the defendant.

[6] Against the said decision, the defendant appealed to the Court of Appeal. We heard the appeal and had unanimously allowed the same. The following are our reasons.

THE APPEAL

[7] Before us, learned counsel for the appellant proceeded on only one issue, namely that the respondent's claim was for indemnity and that there was no evidence adduced by the respondent that the manufacturer or the principal had sought indemnity against the respondent.

[8] The gist of the submission of learned counsel for the appellant was that the loss suffered by the respondent was a folly that the respondent took upon themselves. The respondent, submitted learned counsel, were not mitigating their losses but instead, they had made it worse. It was thus the submission of learned counsel that the loss must lie where it falls.

[9] In response, learned counsel for the respondent submitted that the claim against the appellant was not for indemnity but for loss and damage as a result of the breach of ISU condition.

OUR DECISION

[10] The very narrow issue before us was in relation to cl 12(d) of the conditions of sale. For convenience, we reproduce below the clause which incorporates the terms on the ISU condition alluded to by the respondent. The clause (p 30 of the record of appeal C) states:

12. It is a condition of this sale that the goods shall be used exclusively within the territories of Malaysia or Brunei (collectively known as the 'ISU Territory'). The following will apply —

(a) The selling price quoted herein for each equipment has incorporated a special discount on the Caterpillar International Price List ('ISU Discount') which has been given upfront, but may be revoked in the circumstances set out herein.

(b) Once every three (3) months, commencing from the date of delivery of the equipment until TMB is satisfied that the equipment has completed its Initial Substantial Use, the Buyer shall notify TMB in writing of the precise location of the equipment within the next two (2) weeks and shall (at all times during the two (2) weeks) allow or procure free and unencumbered access to the equipment for authorised representatives of TMB to determine the number of service meter units clocked on the equipment.

(c) Additionally, TMB may at any time and from time to time request to inspect the equipment by giving not less than three (3) calendar days prior notice in writing to the Buyer. Within three (3) calendar days after such request the Buyer shall inform TMB of the precise location of the equipment for the next fortnight and shall (at all times during the fortnight) allow and procure free and unencumbered access to the equipment for authorised representatives of TMB to determine the number of service meter units clocked on the equipment.

(d) The ISU discount shall be revoked and the Buyer shall forthwith upon demand pay to TMB an amount equivalent to the ISU Discount if

(i) the Buyer has failed to prove to TMB's satisfaction (whose satisfaction is at its absolute discretion) that the equipment has completed its Initial Substantial Use exclusively within the ISU Territory; or

(ii) the equipment is located (permanently or temporarily) outside the ISU Territory prior to completing its Initial Substantial Use; or

(iii) the Buyer fails to allow or procure free and unencumbered access to the equipment for authorised representatives of TMB to determine the number of service meter units clocked on the equipment. The Buyer shall (in addition to being liable to pay TMB an amount equivalent to the ISU Discount, if applicable) also indemnify and keep fully indemnified TMB from or against any and all actions, proceedings, damages, losses, costs, demands, claims and expenses (including without limitation legal costs on a full indemnity basis) that may be suffered or incurred by TMB in respect of any and all price equalisation, territorial infringement and/or service fees claims brought by or for TMB's Principal and/or its related corporations and/or their respective dealers, distributors and agents. Where the ISU Discount is expressed in any currency other than Ringgit, the ISU Discount shall be converted to Ringgit using the rate of exchange (for selling the other currency) published by Bank Negara Malaysia for the

business day preceding the date of demand by TMB.

[11] In summary, cl 12 states that the special discount called the initial subscription use ('the ISU discount') given by the principal, Caterpillar, is subject to the condition that each of the excavators bought must be used exclusively within the territories of Malaysia and Brunei and the excavator has attained its initial substantial use before being permitted to be exported out or used outside the said territories ('the ISU condition').

[12] The initial substantial use as defined in cl 12(f) of the conditions of sale means that the excavator has clocked more than 2,000 service meter units and has been used for not less than 12 months from the date of delivery of the excavator.

[13] As provided by cl 12(d), if the ISU condition is breached, the ISU discount shall be revoked and the appellant shall forthwith upon demand, pay to the respondent an amount equivalent to the ISU discount. In addition to the payment of the amount equivalent to the ISU discount, the appellant shall also indemnify the respondent from or against any loss and damage suffered by the respondent in respect of any claim brought by or for the principal against the respondent.

[14] Contrary to the contention of learned counsel for the respondent, we found that by para 13 of the amended statement of claim, the respondent had expressly pleaded the claim based on indemnity.

[15] As can be seen from the following contemporaneous document, the claim was premised on cl 12(d) of the conditions of sale. Vide a letter dated 21 December 2006 from the respondent's solicitors to the appellant (p 76 of the record of appeal C) the solicitor wrote, inter alia:

> Dear Sir,
>
> Re: Inspection of Four (4) Units of New Caterpillar 320C Hydraulic Excavator
>
> Serial Nos ...
>
> We act for Tractors Malaysia (1982) Sdn Bhd in respect of the above captioned matter.
>
> We wrote to you on 29.11.2006 requesting the information on the exact location of the 4 units of excavators to enable our clients to carry out confirmations regarding the usage of the said excavators.
>
> We regret to note that there was no response from you to our said letter of the 29.11.2006.
>
> Due to the seriousness of the matter, our client sent their senior representatives from Kuala Lumpur and Miri offices to meet you on the 1.12.2006 to impress upon you

> the seriousness of the matter at hand and draw your attention to the consequences of breach of clause 12(d) of the terms of the sale of the said 4 units of excavators. The said terms of sale was agreed by you at the time of purchase.

[16] Learned counsel for the respondent contended that the claim against the appellant was for breach of contract, in particular, breach of the ISU condition.

[17] As mentioned above, the requirement to comply with the ISU condition is stipulated in cl 12(d) which provides that if there is a breach of the ISU condition, the ISU discount shall be revoked and the appellant, upon demand, shall pay an amount equivalent to the ISU discount and shall also indemnify the respondent for any loss incurred as a result of any claim from the principal.

[18] Although the statement of claim pleaded that the appellant had failed to allow the respondent access to the excavators and that the appellant had allowed or had caused the excavators to be located outside the ISU territories prior to the completion of the initial substantial use, the respondent had not pleaded that the ISU discount had been revoked and that a demand had been made on the appellant for the payment of the amount equivalent to the ISU discount. Neither was it pleaded that the principal had made any claim against the respondent.

[19] There being no demand made by the respondent against the appellant under cl 12(d) of the conditions of sale, there is nothing for the appellant to indemnify under the terms of the agreement between the respondent and the appellant. And in the absence of the demand, we were of the view that the action of the respondent in going to Dubai and in taking the steps which had given rise to the cost and expenses was entirely a voluntary action of their own. We found support from the following evidence of PW1 (p 181 of the record of appeal):

> ... in practice our Principal, Caterpillar considers the breach of territorial rights as a serious contravention of the dealership as territorial rights given to Caterpillar's dealers worldwide is one of the measure that have been put in place by Caterpillar to control, maintain and monitor their worldwide chain of distributorship. ...
>
> If we do not take action whenever there is such breach by our customer, Caterpillar would perceive that we are collaborating with customer to export machines out of our territory and that we are not upholding the ISU condition on the ISU discount. Therefore we will take all necessary actions, at any costs, in order to ensure that we recover any machines which were exported outside of our territory as we do not wish to take any risk which could jeopardize our relationship with our Principal or our dealership.

[20] The action of the respondent was thus pre-emptive to forestall the breach of the dealership agreement between the respondent and the principal and it had nothing to do with indemnification. In fact, there was no evidence adduced that the principal had sought any indemnity from the respondent, to trigger any claim by the respondent against the appellant under cl 12(d)(iii) of the conditions of sale.

[21] We found that the respondent was the author of their own loss and damage. On the facts and in the circumstances, the appellant ought not to be made liable to reimburse the expenses incurred by the respondent. The learned trial judge, in our view, had erred in coming to the conclusion that the respondent had established the case against the appellant on the balance of probabilities.

[22] For the above reasons, we allowed the appeal and we set aside the order of the High Court. Costs of RM10,000 was ordered to be paid to the appellant by the respondent and the deposit be refunded.

Appeal allowed with costs of RM10,000.

Reported by Kanesh Sundrum